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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 416

RENEE PATRICE GILLIAM, *et al.*,

Petitioners,

v.

SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SCHOOL BOARD OF THE CITY OF HOPEWELL, VIRGINIA, *et al.*,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on April 7, 1965.

Citations to Opinions Below

The memorandum opinion of the District Court of July 11, 1963 (R. I-43)[1] is unreported and is printed in the

[1] The record contains Volumes I to VI. Each volume begins with a page numbered 1. Thus record citations herein are to the volume and page number; the text above indicates Volume I, page 43. There is an additional transcript of a hearing March 23, 1964 (Testimony of Charles W. Smith) which is cited herein as "Smith Tr." (see Note 13, *infra*).

appendix hereto, *infra,* p. 1a. The opinion of the Court of Appeals issued May 25, 1964 (R. I-77), printed in the appendix hereto, *infra,* p. 15a, is reported at 332 F. 2d 460. Further unreported oral opinions of the District Court on April 6, 1964 (R. IV-23) and July 2, 1964 (R. V-42), appear in the appendix below at pages 9a and 22a, respectively. The second opinion of the Court of Appeals dated April 7, 1965 (R. VI-5), printed in the appendix, p. 27a, *infra,* is reported in 345 F. 2d 325.

Jurisdiction

The judgment of the Court of Appeals was entered on April 7, 1965 (R. VI-16; appendix, p. 37a, *infra*). Mr. Justice Goldberg on June 28, 1965 extended the time for filing the petition for certiorari until August 1, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Whether the Hopewell, Virginia school assignment plan based on geographic attendance areas is inadequate under *Brown* v. *Board of Education,* on the ground that it substantially preserves a segregated situation which was created by racial gerrymandering and related practices, and was not remedied by the board's inadequate pupil transfer rule?

2. Whether Negro pupils seeking desegregation of a public school system under *Brown* v. *Board of Education* are entitled to relief against a practice of segregating teachers on the basis of the race of pupils?

Statutes and Constitutional Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

This case involving racial segregation in the public schools of the City of Hopewell, Virginia, was filed October 17, 1962, by petitioners, a group of Negro parents and children,[2] who invoked the jurisdiction of the United States District Court for the Eastern District of Virginia seeking equitable relief pursuant to 28 U. S. C. §1343 and 42 U. S. C. §§1981 and 1983.[3] Petitioners sought an injunction against the city school board and superintendent and against the Virginia Pupil Placement Board, a state agency with statutory responsibilities concerning the assignment of pupils. Petitioners here seek review of the adequacy of a school board desegregation plan which was approved below after numerous hearings in the trial court and two appeals.

The complaint, brought as a class action under Rule 23(a), F. R. Civ. Proc., alleged *inter alia* that the school board "maintains and operates a bi-racial school system in which certain schools . . . are designated for Negro students only and are staffed by Negro personnel and . . . certain schools . . . are designated for white students and are staffed by white personnel"; that the defendants had not

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[2] The original plaintiffs were 9 children attending the public schools and their parents. Fifteen other pupils and their parents subsequently joined as intervenors.

[3] The complaint also alleged "federal question" jurisdiction under 28 U.S.C. §1331.

devoted efforts to initiate desegregation or made a start to effectuate a transition to a racially nondiscriminatory school system; that children were routinely assigned to schools on a racial basis; and that Negro children, including plaintiffs, who applied to white schools were refused enrollment on a discriminatory basis (R. I-2-12).

The complaint requested an order requiring admission of the 9 minor plaintiffs in specified all-white schools and more generally applicable injunctive relief against the segregated system and discriminatory practices. It included a request that the court enjoin defendants "from operating a biracial school system" or require them to submit a plan for "reorganization of the schools on a unitary nonracial basis" (R. I-11). The school authorities generally denied that the Negro children were entitled to relief (R. I-15, 17).

The case was tried before Hon. John D. Butzner[4] and on July 11, 1963, Judge Butzner filed an opinion (R. I-45) and entered an injunction requiring admission of the 9 pupils as requested, and enjoining further use of racially discriminatory criteria including the established attendance areas (R. I-54). The order invited the local authorities to submit a desegregation plan to the Court and stated that the general injunction would be suspended upon approval of a plan (*ibid.*).

At trial, it was established that Hopewell's 905 Negro students and 40 Negro teachers were completely segregated from the 3,530 white pupils and 133 white teachers in the 8 schools of the system. The white pupils and staff were assigned to three elementary schools and one high school

[4] The transcript of this first hearing on June 10, 1963, is Vol. III of the record.

and the Negroes were assigned to three different elementary schools and a high school as indicated in the margin.[5] Negro pupils who sought admission to white schools in 1960 and in 1962 were denied transfers.[6] Pupil assignments were made on the basis of a geographical attendance area map adopted in 1942 and occasionally modified thereafter.[7]

The map designated 6 attendance areas for the 6 elementary schools; three areas were all-white and three were all-Negro. Superintendent Smith testified that the boun-

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[5] The following chart was furnished by the school board December 4, 1962, in response to an interrogatory (R. I-25):

School	Capacity	No. White Pupils	No. Colored Pupils	No. White Teachers	No. Colored Teachers
Patrick Copeland Elementary	740	770	0	26	0
Harry E. James Elementary	330	0	167	0	7
Arlington Elementary	270	0	195	0	10
Dupont Elementary	870	832	0	29	0
Woodlawn Elementary	720	649	0	24	0
Carter G. Woodson Elementary	300	0	286	0	9
Carter G. Woodson High School	350	0	257	0	14
Hopewell High School	1075	1279	0	54	0

The school board's chart shows not only the pattern of student and faculty segregation, but also that the uniformly smaller Negro schools were under-utilized as compared to the large white schools which were either overcrowded or almost filled.

[6] Plaintiffs' Exhibit 8 lists seven 1960 applicants. With respect to 1962 applicants see complaint, para. 12 and schedule "A" (R. I-8, 13-14); Answer of Pupil Placement Board (R. I-17, 18); and Testimony of E. J. Oglesby (R. III-46-53).

[7] The board asserted that for many years pupils were assigned on the basis of attendance areas (R. I-26). A map showing these areas as then established is marked as Plaintiffs' Exhibit No. 7 (R. III-6).

daries had not ever been fixed to permit Negro and white children to attend the same schools (R. III-12). All high school pupils living in the areas of the 3 Negro elementary schools (Arlington, Woodson and James) were assigned to the all-Negro Woodson High School and all pupils in the 3 white elementary zones (Woodlawn, Dupont and Copeland) were assigned to Hopewell High School (R. III-32-33).

All eight school buildings were constructed or acquired during this period of complete segregation.[8] The trial court's injunction against the continued use of this set of attendance areas was based upon findings that the boundaries had been, for the most part, established prior to *Brown;* that the prescribed areas "follow the distribution of Negro and white residences in the city"; that some areas had "natural boundaries" but "in others there is no distinction other than the racial composition of the neighborhoods" (R. I-45); and that the school capacity and attendance figures provided "no rational criterion for the boundaries" (R. I-47). No Negroes lived in any of the white school zones. The few white children living in the area of a Negro school had in the past been granted transfers to a white school in another area (R. III-35-36, 40-41).

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[8] Virginia's massive resistance laws purported to require complete segregation and the closing of any desegregated schools until 1959. See a brief discussion of the massive resistance program in *Griffin* v. *School Board*, 377 U. S. 218, 221. The most recently constructed schools in Hopewell are the all-Negro Woodson Elementary and Woodson High Schools occupied in 1958 (R. III-10-11). The principal area served by Woodson Elementary School was a white residential neighborhood until about 1957 when Woodson School was begun and the whites moved away (R. IV-18-19). Before Woodson was constructed white children in the area attended the Dupont School across the railroad tracks to the north (*ibid.*).

No one appealed the July 11, 1963 injunction. However, on September 4, 1963, fifteen more Negro pupils moved to intervene and for further injunctive relief asserting that they had been refused admission to white schools in violation of the injunction (R. I-56-64). The Court heard evidence September 12, 1963,[9] and ruled that since no desegregation plan had been presented or approved the 15 intervenors were entitled to the requested transfers (R. II-41-48).

Thus, the first desegregation of regular classes in Hopewell took place in September 1963 when 26 or 27 Negro children entered two white schools.[10] The group included 24 petitioners (plaintiffs and intervenors) and 2 or 3 others living in the same neighborhoods (R. IV-12). The racially segregated pattern of school staffing continued unchanged (*ibid.*).

The school authorities appealed the September 13, 1963, order requiring admission of the 15 intervenors to white schools (R. I-66).[11] The trial court had set dates for the filing of a desegregation plan, objections to the plan, briefs and a hearing (R. I-67). Proceedings relating to the desegregation plan continued in the trial court while the appeal was being considered. On May 25, 1964, the Court of Appeals, voting 4-1, dismissed the appeal as moot on

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[9] See Record Volume II.

[10] Two of the plaintiffs had attended summer school at Hopewell High School in 1963 (R. II-19-20, 23-24). In September 1963 plaintiffs enrolled at Hopewell High and Copeland Elementary schools.

[11] The hearing was conducted as one for a temporary restraining order (R. II-2), but a permanent order was entered upon agreement that the court could finally decide the matter (R. I-66).

the ground that the academic year was nearly ended and that assignments for future years could be governed by the plan being considered in the trial court or a further interim order (R. I-77-81; 332 F. 2d 460).[12]

Meanwhile, during this appeal, the school board filed its first "Plan for Operation of Schools" and a motion to dissolve the injunction on October 21, 1963,[13] and the Court held a hearing on March 23[14] and April 6, 1964,[15] and rejected the proposed plan (R. IV-23-29).

The October 21, 1963, plan provided basically for assignments of pupils on the basis of a new attendance map (Defendant's Exhibit 1)[16] which made three changes of the boundaries on the prior map (Pl's Exhibit 7).[17] First, the boundary between the Patrick Copeland (white) and Harry

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[12] Judge Bryan dissented arguing that the rejection of the 15 requests on residential and procedural grounds was "entirely lawful" (R. I-82).

[13] The motion and plan as well as the attached map of proposed school zones may be found in that portion of the record on file in this Court which contains the exhibits. They are all marked Defendants' Exhibit 1 (DX-1). The school zone map (DX-1), is the one now in use. (The original map in file with this Court may be found folded flat with the other exhibits; it is not one of the rolled maps in the file.) A black and white photographic reproduction of this large multi-color map is at the end of the appendix hereto, *infra*.

[14] The March 23, 1964, transcript (Testimony of Charles W. Smith) was printed in Appellee Appendix in the Court of Appeals, but the original was by error omitted from the record. It has been filed in this Court by stipulation. It is cited as "Smith Tr."

[15] Record. Volume IV.

[16] See Note 13 *supra;* also the map at appendix hereto *infra*.

[17] Transcript of hearing on March 23, 1964, "Testimony of Charles W. Smith" (hereinafter cited as "Smith Tr."), pp. 13-16.

E. James (Negro) elementary schools was altered to conform to a railroad line placing about 51 Negro children in the Copeland area (Smith Tr. 14).[18] Second, the board changed a short portion of the boundary between Woodlawn (white) and Arlington (Negro) schools. This change was said to have incorporated three white homes into the Arlington zone (R. IV-14-15), but the Superintendent did not know whether this placed any white school children in the Negro school area (Smith Tr. 15). Third, the boundary was changed between the Dupont (white) and Woodson (Negro) schools to add a small triangular shaped enclave containing white homes (area bounded by railroad tracks in two directions and 15th Avenue) to the Woodson zone (Smith Tr. 16). The five white children in this area either moved or went to private schools when placed in the Negro zone (R. IV-13).

The plan continued the same pattern of high school assignments based on elementary school zones; pupils in the two all-white zones (Woodlawn, Dupont) and one predominantly white zone (Copeland) were assigned to Hopewell High and those in the 3 all-Negro zones (James, Arlington and Woodson) to Woodson High. The plan had two transfer provisions. One stated that transfers would be granted for "some specific reason," giving as an example the transportation convenience of a handicapped child, and that race would not be a factor in granting or refusing such transfers. The second, an explicitly racial provision, allowed transfer

[18] The earlier boundary between Copeland and James was a winding line between Negro and white residences which made approximately 20 turns and moved back and forth across a railroad line. Compare the first map, Pl's Ex. 7, with the second map, DX-1.

of "any colored child, assigned by reason of residence to a school in which he is in the racial minority" to an all-Negro school if both his parents and the board thought the non-segregated assignment was "detrimental" to the child. This latter provision was made severable in the event that the court thought it unconstitutional.

To summarize, the net effect of the plan was to permit a total of 51 Negro children to attend Copeland Elementary School or Hopewell High School and to leave the racial composition of the two other white schools and the four Negro schools unchanged.

Petitioners objected to the plan as inadequate and invalid under the Fourteenth Amendment on various grounds, including an objection to the map asserting that it was "an attempt to continue the discrimination previously enjoined" (R. I-74-75). This pleading also asserted that "the plan as a whole is inadequate in that it fails to make provision for the assignments or reassignments of teachers and other professional personnel on a nonracial basis" (R. I-75).

As previously noted the trial court rejected the plan April 6, 1964 (R. IV-23-29). The court noted that all pupils in the 3 white elementary zones were assigned to Hopewell High and all in the Negro zones to Woodson High; that the Hopewell enrollment exceeded its capacity while the Woodson enrollment did not;[19] and that white children from the Woodlawn zone "have to go a considerable distance

[19] The finding was based on Plaintiffs' Exhibit 1a, indicating in part:

September 1963	*Capacity*	*Enrollment*
Hopewell High	1,075	1,358
Woodson High	350	277

farther to Hopewell High School than if they were assigned to the Carter G. Woodson High School" and also "have to cross more railroad tracks and highways" (R. IV-26-27).

The Court also criticized the Arlington and Woodlawn boundary stating (R. IV-27):

> The area adjacent to the Arlington School zone, which presently feeds into the Woodlawn School, is predominantly white. The line has been drawn separating the predominantly white neighborhood from the predominantly Negro neighborhood.
>
> * * * * *
>
> The primary responsibility is, the Court recognizes for the School Board to draw these lines. But when it ends up, as it does, with a completely segregated school system, the Court is of the opinion that the language of the Court of Appeals in the *Brooks* case is pertinent. [Court then read from *Brooks* v. *County School Board of Arlington County, Va.*, 324 F. 2d 303, 308 (4th Cir. 1963).]

Two months later (June 4, 1964) the board filed an amended plan using the very same attendance areas which had been filed with the first plan and rejected on April 6, 1964 (R. I-84-86). But the new plan provided that elementary pupils in the Woodlawn and Arlington zones might transfer *if* "their residence is nearer an elementary school" outside their zone of residence (R. I-85). The plan also stated that high school students could transfer out of their zones *if* their "residence is nearer a high school other than the one to which" they are initially assigned (R. I-85). The racial minority transfer rule for Negro children was omitted

from the amended plan. Petitioners objected to the plan, basically adopting their exceptions to the first plan (R. I-95).

An examination of the attendance area map (Defendants' Exhibit 1; see appendix *infra*) shows at a glance that no part of the Negro Arlington area is nearer to the white (Woodlawn) school than to Arlington, although white residences in the Woodlawn zone are closer to Arlington than to Woodlawn since a portion of the Woodlawn zone is within 1 block of Arlington school.[20] Similarly, parts of Woodlawn zone are closer to the Negro Woodson High School than to Hopewell High but the Negro school zones are all closer to Woodson High than to Hopewell High (R. IV-26-27).

At a hearing on the amended plan (July 2, 1964; R. Volume V) the board filed the affidavit of Superintendent Smith (R. I-89) stating that the boundaries were the same as those previously submitted and that a survey showed that boundary changes suggested by petitioners' counsel to the school board would overcrowd Arlington and Woodson schools.[21] The affidavit also reported "expected enrollments" for several schools in September 1964 and some

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[20] See Def's Ex. 1. See also, testimony at the original trial at R. III-31.

[21] Petitioners did not propose any boundaries to the Court. They did suggest to the school board possible modifications of zones to include white pupils in 3 under-capacity Negro school zones, but did so tentatively without benefit of any survey of pupil residences. The school board did not present any data relating to the feasibility of any intermediate boundaries between its proposals and plaintiffs' suggestions.

new arrangements of classes.[22] No evidence other than the affidavit was offered at the hearing on the new plan (R. Volume V).

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[22] In order to make the enrollment and capacity figures more readily available and comprehensible, the following data is extracted from various exhibits, affidavits, etc.:

a. 1962-63 school year, see note 5, *supra;*

b. 1963-64 school year (September 1963); from plaintiffs' exhibit 1-A (4-6-64) (same document also marked Def's Exhibit 5):

School	*Capacity*	*Attendance*	*Pupil-Teacher Ratio*
Woodlawn	720	667	27.8
Dupont	870	858	30.1
Copeland	720	780	30.0
Hopewell High	1,075	1,358	31.5
Woodson High	350	277	19.7
James	300	150	15.0
Arlington	270	190	21.1
Woodson Elementary	300	280	28.0

c. Estimates for 1964-65 school year; from Smith affidavit (R. I-89-94) indicating "expected" enrollments:

School	*Capacity*	*"Expected Attendance"*
Woodlawn	720	712
Dupont	870***	858***
Copeland	720	780***
Hopewell High	1,250*	1,440
Woodson High	400**	250
James	300	150***
Arlington	270	234
Woodson Elementary	240**	220

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* Capacity increased by use of increased number of teaching periods; no new classrooms.

** Shift of 2 rooms from elementary to high school use changed capacities.

*** Figure based on previous year; no newer data supplied.

After hearing arguments[23] the trial court approved the school board's amended plan[24] stating:

> The chief difference between the situation that now exists and that which existed at the hearing this spring when the Court declined to approve the plan is that the new plan submitted by the Board provides for transfer of Arlington or Woodlawn Elementary pupils to any school nearer a pupil's residence. It also provides that high school students may transfer from the Hopewell High or Woodson High, as the case may be, to the high school which is nearer their residence.
>
> • • • • •
>
> The Court finds that the School Board has attempted in good faith to create zones consistent with the capacity and attendance of the schools, and the Court believes that the plan which has been suggested is consistent with the suggestion made by the Court of Appeals pertaining to some other assignment method in the unsettled zones (R. V-44-45).

The Court ruled that the 24 Negro children assigned to white schools by prior court order could continue in those schools notwithstanding the fact that they lived in all-Negro zones, and entered an order approving the plan, dissolving the injunction and retaining the cause on the docket (R. I-97-98).

Petitioners appealed the order approving the plan and dissolving the injunction and the School Board cross-

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[23] The faculty desegregation issue was argued by plaintiffs (R. V-33-36).

[24] The oral opinion is at R. V-42-45.

appealed the order allowing the Negro litigants to continue in the white schools (R. I-99, 101).

The Fourth Circuit, *en banc,* affirmed on both appeals (345 F. 2d 325). The opinion of the Court by Judge Haynsworth said the trial court was justified in concluding that the boundaries were "reasonably drawn in accordance with natural geographic features and not on racial lines," that "de facto segregation" resulted from the residential patterns and that assignment by fair zones was constitutional. The Court affirmed the failure of the District Court to enter an order against faculty segregation citing its contemporaneous decision in *Bradley* v. *School Board of the City of Richmond,* 345 F. 2d 310 (4th Cir. 1964), where it said that pupils have standing to raise the issue to the extent it involved an asserted denial of their rights, but that the issue was ignored below and there was "no inquiry as to the possible relation, in fact or in law, of teacher assignments to discrimination against pupils" or of the impact of such an order. It said that the District Court had "a large measure of discretion" concerning "whether and when" to make an inquiry into faculty desegregation (345 F. 2d at 320).

The Fourth Circuit upheld the order permitting plaintiffs to remain in the schools they had entered under the earlier court orders notwithstanding this was inconsistent with the zoning plan saying that the trial court had a discretion to make such exceptions "as fairness and justice seem to it to require." Judge Bryan dissented in part arguing that the plaintiffs should be retransferred to the schools in their zones (345 F. 2d at 329).

Judges Sobeloff and Bell concurred separately agreeing that zone boundaries drawn without racial discrimination

may be accepted, but noting that "the size and location of a school building may determine the character of the neighborhood it serves" and that the school board "must keep in mind its paramount duty to afford equal educational opportunity to all children without discrimination; otherwise school building plans may be employed to perpetuate and promote segregation" (345 F. 2d at 329). Judges Sobeloff and Bell also stated that their concurrence was subject to the views expressed in their separate opinion of the same date in *Bradley* v. *School Board of the City of Richmond*, 345 F. 2d 310, 321.

In that case they dissented from the failure of the court to order desegregation of teaching staffs:

> The composition of the faculty as well as the composition of its student body determines the character of a school. Indeed, as long as there is strict separation of the races in faculties, schools will remain "white" and "Negro," making student desegregation more difficult. The standing of the plaintiffs to raise the issue of faculty desegregation is conceded. The question of faculty desegregation was squarely raised in the District Court and should be heard. It should not remain in limbo indefinitely . . . (345 F. 2d at 324).

Reasons for Granting the Writ

The approval of Hopewell's desegregation plan by the courts below presents questions of general public importance bearing on the extent to which the principle of *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294, will be implemented in the states which have required public school segregation.

First, the case involves the adequacy of a school board's arrangements to satisfy its duty to disestablish a segregated school system which it created over the years by racially gerrymandering school attendance districts and related practices. It is important that this Court deal with this issue, even though it involves details of local assignment practices, in order to guide and encourage the lower federal courts to deal with the important detailed problems that ultimately determine whether *Brown* is implemented in any meaningful fashion where a school board is recalcitrant. As some districts retreat from massive resistance they may believe that segregation can be maintained by "sophisticated" rather than "simple minded" (cf. *Lane* v. *Wilson*, 307 U. S. 268, 275) techniques. To them it must be shown that their ingenuity should be directed at achieving compliance, not in avoiding it.

Second, there is a question on the level of principle rather than that of implementation. Faculty segregation is a matter of widespread concern in thousands of school systems. The teacher segregation problem, also presented in the companion petition for certiorari filed in *Bradley* v. *The School Board of the City of Richmond*, *supra*, is a

matter which cries out for prompt resolution by this Court. As we argue below, faculty segregation preserves the segregated all-Negro schools and prevents the creation of truly nondiscriminatory school systems. The United States Commissioner of Education in implementing Title VI of the Civil Rights Act of 1964 (42 U. S. C. A. §2000d) has announced in a general policy statement that "all desegregation plans shall provide for the desegregation of faculty and staff,"[25] but only a few courts have taken unequivocal action. The Commissioner of Education is faced with the problem of passing upon thousands of school district desegregation plans within a very brief period of time. To this end, he has established procedure whereby school boards may qualify for aid by filing with his office either an "Assurance of Compliance" (HEW Form 441), or a final court order requiring desegregation, or an acceptable plan for desegregation (General Policy Statement, *supra*, II).

The failure of the school board herein to act with respect to teachers apparently violates HEW requirements. Moreover, if HEW were to review the desegregation plan in operation in Hopewell it might disapprove of it. But the

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[25] General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools, HEW, Office of Education, April 1964. The document, hereinafter cited as "General Policy Statement" is reprinted in the appendix to *Price* v. *The Denison Independent School District*, —— F. 2d —— (5th Cir. No. 21632, July 2, 1965), and in *Southern School News*, May 1965, pp. 8-9.

The Commissioner's action is clearly in accord with the intent of the legislative proponents of the Act. See the speech of Vice President (then Senator) Humphrey introducing Title VI in the Senate, clearly stating that the Commissioner can require "elimination of discrimination in employment or assignment of teachers" (110 Cong. Rec. 6325 (daily ed. March 30, 1964)).

"final court order" rule which HEW has adopted apparently insulates Hopewell from its scrutiny. Moreover, the general policy of HEW has been to impose requirements comparable to those required by the federal judiciary in the area. It is in the national interest that a uniform rule be announced by this Court.

I.

The Pupil Assignment Plan Approved Below Operates to Minimize Desegregation and Is Not Adequate to Correct Racial Segregation Created by Public Officials.

When this case commenced Hopewell's public school children were completely segregated by race in eight schools established on a racial basis by the use of school attendance areas adopted for the purpose of separating Negroes from whites. After prolonged litigation the courts below approved a plan sanctioning minimal changes. The approved plan employs school zones only slightly different from those used before, with the result that one formerly white elementary school and one formerly white high school have a few Negro pupils and the other schools remain as they were before the suit.

The trial court ultimately approved a plan based on attendance zones which it found were established on the basis of race prior to *Brown* v. *Board of Education, supra,* on the mistaken ground that a pupil transfer provision in the plan would alleviate the situation in the "unsettled zones" established for Woodlawn and Arlington Elementary Schools and for Hopewell and Woodson High Schools. Although the trial court had relied on the earlier Fourth

Circuit suggestion of some nongeographic assignment method in these areas (see 332 F. 2d at 462), the Fourth Circuit approved the plan on a different ground. It held (we believe erroneously) that the trial court had found the zones fair and nonracial, and added its own conclusion that this was so. Both courts employed the term *de facto* segregation to describe the results of the plan, thus ignoring the school board's role in creating and continuing the segregated situation and excusing its failure to ameliorate the situation it created.

The approved plan employed the very same school zones which the trial court denounced three months before as based on race resulting in segregation.[26] The trial court referred to the pupil transfer rules in the amended plan, which were only applicable to the specific areas previously criticized, as "the chief difference" between the plan approved and the plan rejected earlier (R. V-44).

However, this difference in the form of the plan made absolutely no difference in the results of the plan. The transfer rule, applicable only to elementary pupils in the Woodlawn and Arlington areas, and to high school pupils, allowed transfers out of attendance areas only for pupils who lived closer to a school outside their areas. The reality —as a glance at the map reveals—is that only white pupils

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[26] On April 6, 1964, Judge Butzner criticized the high school zones and the Arlington-Woodlawn elementary zones. He specifically said that the Arlington-Woodlawn boundary "line has been drawn separating the predominantly white neighborhood from the predominantly Negro neighborhood" (R. IV-27). Actually, the Woodlawn zone was "entirely," rather than "predominantly," white and there was no testimony that there were any white school children in the Arlington zone (Smith Tr. 15).

were so situated and no Negro pupils lived in areas where they could use this transfer rule. If white pupils were attempting to get transfers out of all-white schools to attend schools with Negro pupils and all-Negro faculties, the provision would indeed promote desegregation. But, as is well understood, that situation does not exist in Hopewell. Negroes were the ones who are seeking to end the segregated pattern in Hopewell. Thus, it was totally unreasonable to expect that any change in the racial composition of the schools would occur because of this transfer rule. The rule was meaningless because the Negroes who wanted transfers could not get them and the whites who could get transfers did not want them.

Considering the realities, it is not at all surprising that the Court of Appeals barely mentioned the transfer rule and placed little if any reliance on it to sustain the plan. But there is considerable irony in this because although the trial court had rejected the plan in the absence of the transfer feature, the Fourth Circuit approved the plan on the ground that the zones were fair and nonracial and asserted that the trial court supported this view.

There is no persuasive indication that the trial court on July 2, 1964, modified its April 6, 1964, finding that the zones were drawn on a racial basis to separate the Negro and white residential areas. The later opinion expressly embraced the earlier findings modifying them only to the extent to mentioning new data estimating school enrollments for the affected schools in the forthcoming (September 1964) term. There was no enrollment change which could be thought to have supported a different conclusion, since neither Arlington nor Woodlawn school was over-

crowded at any time during the litigation, while the pattern of overcrowding in the white high school and under-utilization of the Negro high school also continued throughout.[27] It cannot be gainsaid that Judge Butzner repeatedly indicated that the transfer feature of the new plan, which he conceived as consistent with the suggestion made by the Court of Appeals in its first opinion, was the principal basis for his approval of the plan. The one sentence in his oral opinion which lends any support to the view that he approved the zones was one in which he said that he thought the board was trying in good faith to create zones consistent with school capacity and attendance. Yet in this very sentence Judge Butzner again referred to the "unsettled zones" and the Fourth Circuit suggestion for another assignment method in those areas.

In any event, there are a variety of reasons why the zones should not have been approved by either the Fourth Circuit or the trial court (if it did approve them). The controversy focuses on the Woodlawn-Arlington Elementary boundary and also on the high school attendance pattern. We shall discuss them in that order, before reviewing several more general problems relating to the obligation of a school board to correct an unlawful system which it has created.

Throughout the case the Arlington-Woodlawn boundary has effectively separated the Negro and white pupils living on each side of the boundary between the two completely segregated schools. The boundary was drawn for this purpose at a time when segregation was mandated by Virginia

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[27] See statistics for 3 consecutive school years bearing this out in notes 5 and 22, *supra*.

law. Arlington, a small school at the western edge of the City has served the small Negro population in that area. Woodlawn, a larger school, serves the larger white population in the nearby area which comes within one block of Arlington School. Arlington, like all of the Negro schools, is much smaller than the white schools. None of the Negro schools has enrolled or is built to accommodate even half as many pupils as the smallest white school.

Although the Arlington area was based on race, the boundary accomplished this without any ingenious classical gerrymander. This boundary just ran along ordinary streets that separated the Negro and white pupils' residences. True to its purpose, the boundary did zone white pupils living just one block from the Negro school into a white school more than a dozen blocks away (R. III-31). But the racial residential pattern was such that there was no need for a meandering line forming a classical gerrymander with a grotesque shape.

Such a flagrant and obvious gerrymander in the classic sense had been used in Hopewell to separate the James and Copeland schools; the line meandered through 20 or more turns back and forth across a railroad track to separate Negro and white homes (see Pl's Ex. 7, the first zone map). The change of this gerrymander was the only alteration of the prior zones which has produced any actual desegregation of a school. The only Negro pupils in Hopewell entitled to attend a white school are approximately 51 children at the eastern side of the City who live in the area changed from James to Copeland. The high school pupils among this group of 51 are in the Hopewell High School zone accounting for the only high school desegregation under the plan.

The school board did make a slight change of the Arlington-Woodlawn boundary; it straightened one portion of the line which wound between Negro and white houses without affecting the school population (Smith Tr. 15). This change moved a short segment of the line from Arlington Road one block west to Wall Avenue (*ibid.*).

As noted, Judge Butzner condemned the boundary before and after it was altered (R. I-45; IV-27). But the Court of Appeals said that the boundary was logical and reasonable because the court said it followed "a main arterial highway" (345 F. 2d at 327). This determination that the line followed a highway is obviously based on a misunderstanding of the testimony. The school board never really claimed this, and the only trial court finding on the subject tends to show the contrary, as does the testimony. At the first trial, June 10, 1963, the superintendent, when asked if there was any barrier between Arlington and Woodlawn, replied: "No. There is no gully, ravine, that sort of thing. There is a street" (R. III-43). There was a finding to this effect (R. I-47). After the new map was adopted Superintendent Smith gave a great deal of testimony about this boundary in hearings on March 23 (Smith Tr. 20-26) and April 6, 1964 (R. IV-2-8, 14-18, 19), and an affidavit (R. I-92). In all of this testimony there was no claim that the boundary followed a main traffic route and there is testimony to the contrary.[28] There is a major road

[28] Some of the streets which constitute the boundary are Old Courthouse Road, Berry Street, Wall Avenue and Wall Street. Superintendent Smith said Old Courthouse Road "is not a major traffic artery, but it is used sometimes in getting to Route 36 . . . for people who live in this area" (Smith Tr. 22). There was no testimony that Berry Street was a major traffic artery. At one

in the area, a four lane highway along Palm Street and Plant Street (R. IV-16-17) which runs across the Woodlawn attendance area and across a small portion of the Arlington area but does not serve as a boundary at all.

The school board in arguing the case below has made much of the fact that a boundary change proposed to the board by petitioners would overcrowd Arlington School. But the fact remains that large numbers of white pupils do live closer to the Negro school, some of them within a block of Arlington and more than a dozen blocks from Woodlawn. The school board continues to assign them to the white school, the Superintendent saying: "Woodlawn School could hold them. There was no point taking them out of there" (R. IV-19). While Arlington could not accommodate every white pupil in the nearby area so long as the present number of Negroes are assigned there it could accommodate some of them. The number obviously depends on the number of Negroes living greater distances from Arlington than the whites who are assigned to Arlington. The present number of Negroes at Arlington also relates to the fact pupils in grades 6 and 7 in the Arlington area were recently returned to Arlington from the Woodson School (Superintendent's Affidavit, R. 91). The sum of the matter is that the school board, faced with a variety of courses of action, has consistently chosen the course of

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point the Superintendent said he thought Wall Street was going to be connected to Palm Street, an "arterial throughway" (Smith Tr. 23-24). But he acknowledged that there was no existing connection between Wall and Palm (Smith Tr. 24), subsequently retracted the original statement by saying that Wall and Palm would not connect (R. IV-3-4), and filed an affidavit that the connection might be at High Street and Palm (R. I-92). So Wall Street is not a highway, or connected to a highway, or even a through street (Smith Tr. 25-26).

action which maintains Arlington and Woodlawn Schools completely racially segregated. Petitioners submit that something more than this is necessary to satisfy the board's constitutional duty to undertake to reform the segregated situation which it deliberately created in the first place.

The high school attendance plan is even more patently designed to maintain racial segregation. All pupils in the areas of the three Negro elementary school zones are assigned to Woodson High and all pupils in the two all-white and one predominantly white elementary zones are assigned to Hopewell High. The Fourth Circuit upheld the zones based on the following reasoning: (1) The elementary zones are reasonable; (2) the high school zones are combinations of the elementary zones; *ergo,* (3) the high school zones are reasonable. The court's reasoning ignores the critical facts that the secondary schools have different enrollments, capacities, and locations than the various elementary schools.

The result of the high school zoning is shocking. The large white high school has been overcrowded consistently and remains overcrowded even with the school program altered by a special extended day operation to increase the capacity of the building without adding more rooms. The small all-Negro high school (about one-third the size of the white school) is significantly under-utilized operating on a regular school day basis.[29] This pattern is not compelled by any topographic features and residential pat-

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[29] The overcrowding at Hopewell High and under-utilization of Woodson High has existed at least since 1960. See enrollment statistics for November 1960 (Plaintiffs' Exhibit 11) and September 1962 (Plaintiffs' Exhibit 17c). The more recent enrollment data appears in notes 5 and 22, *supra*.

terns. Large numbers of white pupils live closer to the Negro high school than they do to Hopewell High. Some of these white pupils traveling to Hopewell High from the Woodlawn attendance area not only live closer to Woodson, but have to cross more railroad tracks and highways to get to Hopewell. Judge Butzner so found (R. IV-26-27).

The school board, before the suit was filed, maintained segregation by assigning all white children to Hopewell and all Negroes to Woodson. Hopewell High School was built in 1925 and expanded over the years to serve the white high school population (R. III-11). Carter G. Woodson High School was planned, located and built for Negroes during Virginia's massive resistance era; it opened in 1958 as an all-Negro school (R. III-11; IV-18-19). Woodson was built to accommodate approximately one-fourth of the pupils in a system where almost one-fourth are Negro, and assigned an all-Negro staff. It was located on the edge of the Negro ghetto, and white families in the area moved away during its construction (R. IV-18-19). Thus, the school segregation policy may have had a direct impact on the residential pattern. Certainly, it is true that the segregation system at the high school level was reenforced and concretized subsequent to the *Brown* decision by the erection of a new all-Negro high school. The school's location and size facilitates segregation. The court-approved plan allows a small number of Negro children living at the edge of the ghetto (Copeland area) to attend the white high school and leaves the pre-existing situation otherwise intact.

In discussing both high schools and elementary schools the court below uses the term *de facto* segregation and cites *Bell* v. *School City of Gary, Indiana,* 324 F. 2d 209

(7th Cir. 1963), *cert. denied* 377 U. S. 924, a case involving distinct issues in a northern community. Whatever may be the constitutional obligation of school systems with racially imbalanced schools caused by varied conditions and policy decisions (see generally, Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concepts," 78 Harv. L. Rev. 564 (1964)), this case presents the significantly different problem of a segregated school system which was carefully and deliberately established as such over a period of years under Jim Crow laws compelling segregation. The issues here relate to the duty of a school system to take the action necessary to eliminate the effects of its own deliberate and long sustained deliberate segregation policies. Segregation in Hopewell was actively fostered by locating schools of particular sizes on particular sites to accommodate Negro pupils (and only Negro pupils) and by drawing school zones to embrace the Negro population. Hopewell's case is much like that of New Rochelle, New York, where the courts required steps to undo the effects of past racial gerrymandering and transfer policies. *Taylor* v. *Board of Education,* 191 F. Supp. 181 (S. D. N. Y. 1961), *aff'd* 294 F. 2d 36 (2nd Cir. 1961); *cert. denied* 368 U. S. 940. The differences are that Hopewell's segregationist practices were open, compelled by law and much more recent than the gerrymandering in New Rochelle which was covert and occurred many years before the lawsuit.

Whatever might be said of Hopewell's geographic zoning plan for assigning pupils if it were appraised hypothetically in another context where there was no history of compulsory segregation, this case should be decided in its factual context against the background of school planning and

manipulation to foster segregation. Against that background it is reasonable to judge the plan by its results. A plan which leaves the four all-Negro schools completely segregated, and allows only about 50 Negro pupils to attend two of four white schools, plainly has not been adequate to eliminate the segregated situation created by past practices. Hopewell has exerted every effort to keep desegregation to a minimum, including twice appealing to the Court of Appeals to remove Negroes from white schools. The courts below have allowed Hopewell's board to succeed in minimizing desegregation by giving approval to the plan of geographic areas organized on a racial basis around schools located for Negroes. The artificiality of the present system is made entirely plain when one contemplates the fact that not one of the Negro schools has even one-half as many pupils as the smallest white school. The continuance of segregation cannot be justified by topography or alleged natural barriers such as railroad tracks which were ignored frequently in constructing zones to accomplish segregation prior to the lawsuit. Nor can school segregation be passed off as an inevitable consequence of residential patterns where schools have been deliberately established so as to conform exactly to the segregated housing pattern.

II.

Segregation of Public School Faculties Violates the Fourteenth Amendment and Should Be Abolished.

We submit that the courts below have erred in refusing to require Hopewell's public school authorities to end the practice of assigning all white teachers to white schools and all Negro teachers to Negro schools. Petitioners' view is that this segregationist practice of hiring and placing public school teachers on a racial basis is unconstitutional *per se* and has not the slightest justification under the Constitution. In a long series of cases since *Brown* this Court has invalidated state requirements of segregation in every context in which they have appeared.[30]

The only possible justification for withholding relief in this case is that petitioners who are public school pupils are not entitled to invoke the aid of the courts to halt the admittedly unlawful practice. Petitioners submit that the

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[30] In a unanimous opinion this Court said:

> ". . . [U]nder our more recent decisions any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

Colorado Anti-Discrimination Commission v. *Continental Air Lines*, 372 U. S. 714, 721.

See also, *Johnson* v. *Virginia*, 373 U. S. 61 (courtroom); *Bailey* v. *Patterson*, 369 U. S. 31 (transportation); *Peterson* v. *Greenville*, 373 U. S. 244 (restaurant); *Turner* v. *Memphis*, 369 U. S. 350 (airport restaurant); *Browder* v. *Gayle*, 352 U. S. 903 (buses); *Griffin* v. *School Board of Prince Edward County*, 377 U. S. 218 (schools); *Dawson* v. *Baltimore City*, 350 U. S. 877 (municipal beaches); *Holmes* v. *Atlanta*, 350 U. S. 879 (municipal golf courses).

unlawful practice is closely linked to their right under *Brown* v. *Board of Education*, 349 U. S. 297, to have the district courts supervise the effectuation of "a racially nondiscriminatory *school system*" (349 U. S. at 301, emphasis added). The Court in deciding the second *Brown* case, *supra*, pointed to administrative problems related to "the physical condition of the school plant, the school transportation system, *personnel*, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations . . . ", as matters to be considered in appraising the time necessary for good faith compliance (emphasis added). We believe that the Court plainly regarded the task as one of ending *all* discrimination in school systems, including "personnel" as well as discrimination in the transportation system, attendance districts or the other factors mentioned. The delay countenanced by the "deliberate speed" doctrine was predicated on the assumption that dual school systems would be reorganized.

The brief of the United States, as *amicus curiae*, in *Calhoun* v. *Latimer*, 377 U. S. 263, argued in this Court that:

> Obviously, a public school system cannot be truly nondiscriminatory if the school board assigns school personnel on the basis of race. Full desegregation can never be achieved if certain schools continue to have all-Negro faculties while others have all-white faculties. Schools will continue to be known as "white schools" or "Negro schools" depending on the racial composition of their faculties. It follows that the school authorities must take steps to eliminate segregation of

personnel as well as pupils. (Brief of the United States, pp. 39-40.)

The Court in *Calhoun* vacated the judgment without discussion of this issue. We submit that this case presents an appropriate occasion to consider this question.

Faculty segregation was an integral part of the segregated school systems maintained under the separate but equal doctrine. It was the well-known general practice that Negroes taught only Negroes and whites taught only whites. Virginia law encourages teacher segregation by providing that teachers may terminate their contracts when pupils are desegregated "or both white and Negro teachers shall have been employed in the school to which the contracting teacher is assigned." [31]

An all-Negro faculty is as sure an indicator that a school is a "Negro" school as a racial sign over its door. Judges Sobeloff and Bell were plainly right in their dissent in the Richmond school case[32] where they said that "composition of the faculty as well as the composition of its student body determines the character of a school," and that with "strict separation of the races in faculties, schools will remain 'white' and 'Negro,' making student desegregation more difficult." [33]

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[31] Code of Va., 1950, §22-207 (1964 Replacement Vol.). The above-quoted provision encouraging faculty segregation was adopted in 1962. (Va. Laws 1962, c. 183.) Under Virginia law division school superintendents have authority to assign and reassign teachers. Code of Va. 1950, §22-205.

[32] *Bradley* v. *School Bd. of City of Richmond, Va.*, 345 F. 2d 310, 324 (4th Cir. 1965).

[33] *Id.* at 324.

But the Fourth Circuit has not stated its clear disapproval of faculty segregation in any of the cases in which it has considered the matter[34] and apparently has adopted the view that faculty desegregation must depend upon some kind of evidentiary showing by plaintiff Negro pupils that

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[34] Faculty segregation was first considered by the Fourth Circuit in *Jackson* v. *School Board of the City of Lynchburg*, 321 F. 2d 230, 233 (4th Cir. 1963), where it held that a complaint asking for desegregation of a school system was sufficient to raise the question. See also, *Griffin* v. *Board of Supervisors*, 339 F. 2d 486, 493 (4th Cir. 1964); *Bowditch* v. *Buncombe County Board of Ed.*, 345 F. 2d 329, 332, 333 (4th Cir. 1965); *Wheeler* v. *Durham City Board of Education*, —— F. 2d —— (4th Cir. No. 9630, June 1, 1965), and, of course, the *Bradley* case, *supra*, and the instant case.

In the Fifth Circuit see: *Board of Public Instruction of Duval County* v. *Braxton*, 326 F. 2d 616, 620 (5th Cir. 1964), *cert. denied* 377 U. S. 924 (affirming a trial court order requiring a faculty desegregation plan). See also *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F. 2d 862 (5th Cir. 1962); *Calhoun* v. *Latimer*, 321 F. 2d 302 (5th Cir. 1963), *vacated and remanded* 377 U. S. 263.

The Sixth Circuit has twice held that it was proper for pupils and their parents to raise the issue of segregation of teachers. *Mapp* v. *Board of Education of City of Chattanooga*, 319 F. 2d 571, 576 (6th Cir. 1963); *Northcross* v. *Board of Education of City of Memphis*, 333 F. 2d 661, 666 (6th Cir. 1964).

Several other courts have discussed the question of segregation of teachers with a variety of results. *Brooks* v. *School District of City of Moberly, Mo.*, 267 F. 2d 733 (8th Cir. 1959), *cert. denied* 361 U. S. 894 (1959); *Franklin* v. *County School Board of Giles County*, Civil No. 64-C-73-R, W. D. Va., June 3, 1965; *Christmas* v. *Board of Education of Harford County*, 231 F. Supp. 331 (D. Md. 1964); *Nesbit* v. *Statesville City Board of Education*, 232 F. Supp. 288 (W. D. N. C. 1964), *vacated*, 345 F. 2d 333 (4th Cir. 1965); *Tillman* v. *Board of Instruction of Volusia County, Florida*, Civil No. 4501, 7 Race Rel. L. Rep. 687 (S. D. Fla. 1962); *Manning* v. *Board of Public Instruction of Hillsborough County, Fla.*, Civil No. 3554, 7 Race Rel. L. Rep. 681 (S. D. Fla. 1962); *Lawrence* v. *Bowling Green, Ky. Board of Education*, Civil No. 819, 8 Race Rel. L. Rep. 74 (N. D. Ky. 1963); *Mason* v. *Jessamine County, Ky. Board of Education*, Civil No. 1496, 8 Race Rel. L. Rep. 75 (E. D. Ky. 1963); *Dowell* v. *School Board of Oklahoma City Public Schools*, 219 F. Supp. 427 (N. D. Okla. 1963).

they are disadvantaged by the practice in the circumstances of the particular case. That is the only reasonable explanation for the Fourth Circuit's repeated statements in cases where the existence of faculty segregation is undisputed, that there was insufficient showing that faculty segregation was a denial of plaintiffs' constitutional rights. The Fourth Circuit apparently accepts the standing of pupils to litigate the question but demands that they prove that faculty segregation is a discrimination against them—as opposed to a discrimination against the teachers themselves.

But, as Judges Sobeloff and Bell have said, faculty segregation obviously makes student desegregation more difficult. A school board decision that it is willing to assign some Negro pupils to classes with white pupils and white teachers but that it is unwilling to assign white pupils to classes with Negro teachers obviously limits the range of choices the board has when it determines pupil assignment patterns or attendance areas. The Negro faculty school obviously continues as a school for Negro pupils only. To the extent that students or parents are given a choice between schools, faculty segregation encourages them to make their choice on a racial basis. The very existence of faculty segregation reflects the school authorities' judgment that the race of teachers is significant and makes a difference. Cf. *Anderson* v. *Martin*, 375 U. S. 399. This is obvious in the context of states where school segregation has been defended vigorously by public officials for a decade since *Brown*.

Faculty segregation assures continuance of the prevailing trend of one-way desegregation, i.e., movement of Negro pupils to formerly white schools without any corresponding movement of white pupils to Negro faculty

schools. Throughout the southeast part of the country there are few exceptions to this brand of desegregation which leaves the "Negro" school intact with an all-Negro student body and faculty.

It is estimated that there are 419,199 white teachers and 116,028 Negro teachers in 11 southern states, 6 border states (excluding Maryland) and the District of Columbia.[35] In 1963-64, Virginia public schools employed 31,443 white teachers and 9,051 Negro teachers.[36] There were 733,524 white pupils and 34,176 Negro pupils (total 967,700).[37] Of 128 districts with Negro and white pupils, 81 districts had at least one Negro pupil in school with whites in November 1964, but only five of those districts had Negroes teaching in school with whites.[38] There was no faculty desegregation in Alabama, Georgia, Louisiana, Mississippi and South Carolina.[39] One North Carolina district, 2 Florida districts, and 7 Tennessee districts had some faculty desegregation, and one Arkansas district had a Negro supervisor of elementary schools but no Negro teachers in desegregated classes.[40]

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[35] Southern Education Reporting Service, Statistical Summary of School Segregation-Desegregation in the Southern and Border States, 14th Rev. (Nov. 1964), p. 2.

[36] *Id.* at 59.

[37] *Ibid.*

[38] *Ibid.* The summary reports: "Some Negro teachers are teaching in schools with whites in Alexandria and Roanoke, and in Arlington and Fairfax Counties. In Prince Edward County, nine of the 68 teachers in the county's one high school and three elementary schools are white."

[39] *id.* at 2.

[40] *Id.* at 8, 15, 39, 50.

Within the Negro community Negro teachers generally are recognized as having a leadership role with a comparatively high economic position,[41] but their potential as leaders in efforts to promote desegregation of public facilities and schools is limited by the vulnerability of their position as employees of segregationist state agencies.[42] Continued faculty segregation, posing the danger of discharge of Negro teachers as Negro pupils go to white schools where no Negro teachers are assigned, threatens potentially disastrous social consequences for one of the most important social and economic groups in Negro communities in the South.

A recent decision by Judge Michie in the Western District of Virginia enjoined school authorities who discharged every Negro teacher in a small system when the schools desegregated (*Franklin* v. *School Board of Giles County*, —— F. Supp. ——, W. D. Va., Civ. No. 64-C-73-R, June 3, 1965). Other cases involving Negro teachers discharged

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[41] According to the 1960 census the median income for the non-white family was $3,662, but the median for the non-white family whose head was employed as an elementary or secondary teacher was $6,400 (1960 Census of Population, Vol. I, "Characteristics of the Population," Part I, U. S. Summary, Table 230, pp. 1-611).

[42] Lamanna, Richard A., "The Negro Teacher and Desegregation", Sociological Inquiry, Vol. 35, No. 1, Winter 1965. Alabama has enacted 7 laws to permit firing of teachers who advocate desegregation (1956 1st Sp. Sess., Acts 40, 41; 1957 Sess., Act 239, 361; 1961 Sp. Sess., Acts 249, 383, 443). Arkansas laws prohibited NAACP members from holding public employment and required teachers to list organization membership until *Shelton* v. *Tucker*, 364 U. S. 479. A series of Louisiana laws provided for dismissal of public employees advocating integration (La. Acts 1956, Acts 248, 249, 250, 252). Until challenged in court South Carolina barred public employment of NAACP members (S. C. Acts 1956, Act 741), repealed by Act 223 of 1957. See *Bryan* v. *Austin*, 148 F. Supp. 563 (E. D. S. C. 1957), *judgment vacated* 354 U. S. 933.

coincident with desegregation are pending in various district courts. (A partial listing of communities where such cases were recently filed includes Morganton, N. C., Hendersonville, N. C., Asheboro, N. C., Pitt County, N. C., Stanton, Texas, and Wagoner, Oklahoma.)

Petitioners submit that faculty segregation *per se* violates the constitutional rights of Negro pupils because of its inevitable tendency to impede desegregation of pupils. In recognition of this the United States Commissioner of Education, implementing Title VI of the Civil Rights Act of 1964,[43] has announced the following ruling to all school districts submitting plans for desegregation in order to qualify for federal financial aid (General Policy Statement, *supra,* Part V.B.):

> 1. *Faculty and staff desegregation.* All desegregation plans shall provide for the desegregation of faculty and staff in accordance with the following requirements:
>
> a. *Initial assignments.* The race, color, or national origin of pupils shall not be a factor in the assignment to a particular school or class within a school of teachers, administrators or other employees who serve pupils.
>
> b. *Segregation resulting from prior discriminatory assignments.* Steps shall also be taken toward the elimination of segregation of teaching and staff personnel in the school resulting from prior assignments based on race, color, or national origin (see also, V.E. 4(b)).

[43] 42 U. S. C. A. §2000d.

The General Policy Statement also indicates that HEW will not accept an "Assurance of Co. pliance" (HEW Form 441) from any school system in which "teachers or other staff who serve pupils remain segregated." We submit that the determination by the United States Commissioner of Education that faculty desegregation must be included in order for a desegregation plan to be "adequate to accomplish the purposes of the Civil Rights Act" is entitled to substantial weight. Furthermore, the Commissioner's determination implements the clear intent of the Civil Rights Act as expressed by congressional proponents of Title VI. Vice President (then Senator) Humphrey clearly expressed the view that Title VI authorized the Commissioner to require elimination of teacher segregation when introducing the provision in the Senate:

> 'In such cases the Commissioner might also be justified in requiring elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students. See *Board of Education* v. *Braxton* . . .
>
> This does not mean that Title VI would authorize a federal official to prescribe pupil assignments, or to select a faculty, as opponents of the bill have suggested. The only authority conferred would be authority to adopt, with the approval of the President, a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers and authority to achieve compliance with that requirement by cutting off funds or by other means authorized by law. (110 Cong. Rec. 6325 (daily ed. March 30, 1964).)

The Fourth Circuit has not indicated any justification for the policy of assigning teachers on the basis of the race of the pupils, and the school authorities have not suggested any. Nor have the school authorities made any effort to establish that there are administrative obstacles to faculty desegregation justifying delay under the doctrine of the second *Brown* decision (349 U. S. at 300-01). But in the *Bradley* case, *supra* (relied upon in deciding this case), the Fourth Circuit apparently embraced the idea that teacher assignments in accord with the race of pupils were acceptable and seems to have assumed that there were administrative problems in faculty desegregation which justified delays. The Court said:

> The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need not be determined when it is speculative. When all direct discrimination in the assignment of pupils has been eliminated, *assignment of teachers may be expected to follow the racial patterns established in the schools.* An earlier judicial requirement of general reassignment of all teaching and administrative personnel need not be considered until the possible detrimental effects of such an order upon the administration of the schools and the efficiency of their staffs can be appraised along with the need for such an order in aid of protection of the constitutional rights of pupils. (345 F. 2d at 320-321; emphasis supplied.)

There was no explanation of why the teachers assignment patterns should follow the racial patterns of pupils, and no discussion of the duty of the school board to make

initial teacher assignments in the future on a nonracial basis. The opinion contains no indication that it is the responsibility of a school board to hire and place new employees without regard to race and to develop a plan for faculty reorganization; or that the board has the burden of establishing the existence of any administrative problems proffered to support delay under the deliberate speed doctrine.

A policy of assigning teachers to schools on the basis of the race of the pupils is plainly invidious even without regard to its effect on what schools various pupils attend. Pupils admitted to public schools are entitled to be treated alike without racial differentiations in those schools. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. The student's relationship with teachers is central to the educational experience in public schools. When a state decrees that those Negro pupils in all-Negro schools be taught only by Negro teachers and that those Negro pupils in schools with white children be taught only by white teachers, it significantly perpetuates the segregation of Negro Americans in their educational experience. This is contrary to the egalitarian principle of the Fourteenth Amendment and the teaching of *Brown* that segregated education is "inherently unequal."

CONCLUSION

It is respectfully submitted that for the foregoing reasons the petition for certiorari should be granted.

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